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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GABRIEL MARIO CASTANEDA, Petitioner.	2 CA-CR 2008-0426-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200502085

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Gabriel Castaneda — Hinton, OK
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In this petition for review, Gabriel Castaneda challenges the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32 Ariz. R. Crim. P. We accept review but deny relief because the trial court did not abuse its discretion by denying relief below. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Castaneda was originally indicted on charges of burglary and attempted first-degree murder for having shot his victim in the victim's home. After a jury found him not guilty of attempted murder and the trial court granted Castaneda's motion for a new trial on the burglary charge, however, the state obtained a second indictment on burglary and two counts of aggravated assault, based on the same incident underlying the original indictment. The original indictment was then dismissed upon the state's motion. Ultimately, Castaneda entered into a plea agreement whereby he pled guilty to a single count of aggravated assault. The remaining charges were dismissed, and the trial court sentenced him to an aggravated term of nine years' imprisonment for the aggravated assault.[1] It subsequently denied Castaneda's petition for post-conviction relief without holding an evidentiary hearing.

¶3 As he did in his petition below, Castaneda argues that his acquittal of attempted murder barred his conviction for aggravated assault based on the ground of double jeopardy.[2] "[A] defendant does not waive a double jeopardy claim by entering into a plea agreement" absent a knowing, voluntary expression of that waiver. *State v. Millanes*, 180 Ariz. 418, 420,

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[1]The court's sentencing minute entry incorrectly identifies Castaneda's sentence as "presumptive"; however, Castaneda was sentenced within the aggravated range for a class three, dangerous-nature felony. *See* former A.R.S. § 13-604(I), 1999 Ariz. Sess. Laws, ch. 261, § 5.

[2]Castaneda also argued in his petition as follows: "The remaining charge of second degree burglary must also be dismissed due to prosecutorial misconduct." He appears to assert on review that he is entitled to relief on this claim because the state did not respond to it below. Indeed the state did not respond to the argument below, nor did the trial court address the claim in denying post-conviction relief. But, as noted above, all burglary charges had already been dismissed upon the state's motion and pursuant to the plea agreement. Therefore, there simply was nothing for the state or trial court to address, and the court could not have abused its discretion by denying relief.

885 P.2d 106, 108 (App. 1994), *citing Menna v. New York*, 423 U.S. 61, 62-63 (1975). "The Double Jeopardy clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense." *State v. Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 8 (Ct. App. Oct. 14, 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. The prohibition against double jeopardy also protects a defendant from subsequent prosecution for a lesser-included offense. *See State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980). Under the test announced by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), "[d]istinct statutory provisions constitute the same offense if they are comprised of the same elements." *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002). If statutory provisions require proof of one or more different facts, they are not the same offense. *Id.*, *citing Brown v. Ohio*, 432 U.S. 161, 165 (1977), and *Blockburger*, 284 U.S. at 304.

¶4 Castaneda asserts that his prosecution for aggravated assault twice placed him in jeopardy because the facts upon which the charge was based were the same as those that had been presented to the jury on the attempted murder charge of which he had been acquitted. But the test for determining whether offenses are the same for double jeopardy purposes "emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, *notwithstanding a substantial overlap in the proof offered to establish the crimes*.'" *Lemke v. Rayes*, 213 Ariz. 232, ¶ 16, 141 P.3d 407, 413 (App. 2006), *quoting Iannelli v. United States*, 420 U.S. 770, 786 n.17 (1975) (emphasis added); *see also State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App.

2008) ("To determine whether offenses are the same, we analyze the elements of the offenses, not the facts of the case."). Attempted first-degree murder and aggravated assault each requires proof of at least one element the other does not. Unlike aggravated assault, the offense of attempted first-degree murder requires proof of premeditation, but it does not require proof that the defendant either used a deadly weapon or dangerous instrument or caused serious physical injury to the victim, as is required of aggravated assault. *See* A.R.S. §§ 13-1001, 13-1105(A)(1), 13-1203, 13-1204(A)(1), (2). Therefore, they are not the same offense.

¶5 Nor is aggravated assault a lesser-included offense of attempted murder. "An offense is 'lesser included' when the 'greater offense cannot be committed without necessarily committing the lesser offense.'" *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), *quoting State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). Castaneda concedes that "aggravated assault is not technically a lesser included offense of attempted murder." *See State v. Fernandez*, 216 Ariz. 545, ¶¶ 30-31, 169 P.3d 641, 650 (App. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008). But he argues it should be considered a "species of lesser-included offense" under *Illinois v. Vitale*, 447 U.S. 420 (1980). We disagree.

¶6 In *Vitale*, the Supreme Court applied *Blockburger* to determine "whether the Double Jeopardy Clause of the Fifth Amendment prohibit[ed] the State of Illinois . . . from prosecuting for involuntary manslaughter the driver of an automobile involved in a fatal accident, who previously ha[d] been convicted for failing to reduce speed to avoid the collision." *Id*. at 411. Involuntary manslaughter under Illinois law required proof of "a

homicide by the 'reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm.'" *Id*. at 416-17, *quoting In re Vitale*, 375 N.E.2d 87, 91 (Ill. 1978). The Court determined that, if the reckless act the state sought to prove in order to prove involuntary manslaughter was the defendant's failure to reduce speed to avoid a collision, the prosecution would violate the prohibition against double jeopardy. *Id*. at 419-20. The Court relied, in part, on its decision in *Harris v. Oklahoma*, 433 U.S. 682 (1977), in which it had decided that robbery was a "species of lesser-included offense" of a felony murder that was based on a killing in the course of an armed robbery, even though felony murder could theoretically be proved by showing a murder in the course of a different felony. *Vitale*, 447 U.S. at 420-21.

¶7 But these cases do not stand for the proposition that the prohibition against double jeopardy is violated by any prosecution that is based in part on the same factual scenario relied on by the state in an earlier prosecution. *See United States v. Dixon*, 509 U.S. 688, 703-04 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508, 510 (1990), in which court had prohibited subsequent prosecutions "if, to establish an essential element of an offense charged in that prosecution . . . the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted"). Rather, the cases apply the *Blockburger*, same-elements test to situations in which statutes overlap and a greater crime may be proved in multiple ways with alternative elements. *See United States v. Kuhn*, 165 F. Supp. 2d 639, 642-43 (E.D. Mich. 2001); *see also Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 14 ("same elements test merely prohibits consideration of the underlying facts or conduct . . . not . . .

consideration of the offense as it has been charged in determining the elements of an offense"). Further, in both *Vitale* and *Harris*, the lesser crime could only be considered lesser included if the state necessarily proved all elements of the lesser crime in order to prove the greater. *See Vitale*, 447 U.S. at 420-21; *Harris*, 433 U.S. at 682-83; *see also Dixon*, 509 U.S. at 706-07. That was not the case here. Although the factual basis for Castaneda's aggravated assault included evidence of the same conduct that had been presented at Castaneda's trial, the state had not been required to prove all of the elements of aggravated assault in order to support its allegation of attempted murder. Therefore, the aggravated assault here was not a lesser-included offense of attempted first-degree murder. *See Fernandez*, 216 Ariz. 545, ¶¶ 30-31, 169 P.3d at 650.

¶8 Castaneda also relies on *Ashe v. Swenson*, 397 U.S. 436 (1970). There, the Supreme Court applied the "collateral-estoppel effect attributed to the Double Jeopardy Clause," which the court said in *Dixon* "may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts." *Dixon*, 509 U.S. at 705; *see Ashe*, 397 U.S. at 444-46. The Court explained in *Ashe* that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443. In the criminal context, collateral estoppel bars a subsequent prosecution only if a court concludes, based upon the record in the prior proceedings, that no "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id*. at 444. In this case, as Castaneda's counsel pointed out in argument on

his motion for a new trial, it is entirely possible that the jury grounded its not-guilty verdict on a determination that the state had failed to prove premeditation, an element not required for Castaneda's aggravated assault conviction.

¶9 Finally, Castaneda also contends his conviction violates A.R.S. § 13-116. Section 13-116 prohibits double punishment for the same act.[3] It provides: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." "Unlike our double jeopardy analysis, which" as explained above, "focuses on the elements of distinct statutory offenses to determine if they are the same offense, our analysis under § 13-116 focuses on the 'facts of the transaction' to determine if the defendant committed a single act." *Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d at 1155, *quoting State v. Gordon*, 161 Ariz. 308, 313 n.5, 778 P.2d 1204, 1209 n.5 (1989). But Castaneda was not punished twice for one act because he was convicted of and sentenced for only a single offense. Section 13-116 also provides: "An acquittal or conviction and sentence [under one section of the law] bars a prosecution for the same act or omission under any other, to the extent the constitution of the United States or of this state require." As explained above, Castaneda's conviction of aggravated assault

[3]Castaneda also states in his petition for review that, in pursuing the attempted murder and aggravated assault charges, the state "present[ed] two wholly inconsistent offense 'theories.'" However, he did not raise this claim below, nor has he developed it on review. Therefore, we do not address it in this decision. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii), (iv) (defendant may present for review only issues "which were decided by the trial court" and must include argument and "reasons why the petition should be granted").

did not violate the double jeopardy clauses of either the United States or Arizona constitutions.

¶10 Accordingly, although we accept review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PHILIP G. ESPINOSA, Judge